No. 45253-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

vs.

KEELAN BERNICE PREDMORE,

Respondent.

On Appeal from the Pierce County Superior Court
Cause No. 12-1-02910-7
The Honorable John A. McCarthy, Judge

BRIEF OF RESPONDENT KEELAN B. PREDMORE

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I. ISSUES PRESENTED

1. Did the State meet its burden of establishing that Keelan Predmore individually acted to cause damage to another person's property in excess of $5,000?

2. Did the trial court properly grant Keelan Predmore's motion for arrest of judgment, where the State's evidence established that Keelan Predmore was a joint occupant of a home that sustained over $13,000 of damage, and that the damage was likely inflicted around the time the occupants were being evicted from the home, but where no other evidence was presented to establish that Keelan Predmore individually acted to cause any of the damage or that Keelan Predmore individually acted to cause damage in excess of $5,000, both of which were required for conviction in this case?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Keelan Bernice Predmore by Information with one count of first degree malicious mischief (RCW 9A.48.070(1)(a). (CP 1) The State charged her husband, Michael Predmore, with the same crime arising from the same alleged acts.

(CP 114)[1]

Keelan moved to dismiss the charges for lack of evidence both before trial and at the close of the State's case in chief.[2] (CP 3-7; 06/03/13 RP 14; 06/04/13 RP 81-82) The trial court denied both motions. (RP 06/03/13 RP 15-16; 06/04/13 RP 86) Keelan rested without calling any witnesses. (06/04/13 RP 86, 89)

The State proposed a to-convict instruction that asked the jury to find that, "on or about the period between the 17th day of May and the 24th day of May, 2012" Keelan or an accomplice "caused physical damage to the property of another in an amount exceeding $5,000[.]" (CP 24) Keelan's proposed to-convict instruction mirrored the charging document, which alleged that the criminal acts were committed "during the period between the 17th day of May, 2012 and the 24th day of May, 2012[.]" (CP 1, 53) Keelan's proposed to-convict instruction did not include accomplice language, and Keelan objected to the inclusion of that language in the State's instruction. (CP 53; 06/04/13 RP 102)

The trial court rejected the State's proposed to-convict instruction, finding "absolutely no evidence" to support accomplice

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[1] The transcripts will be referred to by the date of the proceeding.
[2] Keelan Predmore and Michael Predmore will be referred to by their first names in this brief to avoid confusion.

liability. (06/04/13 RP 109) The parties did not discuss the addition of the "on or about" language. (06/04/13 RP 102-10) The court informed the parties that it would give Keelan's to-convict instruction, but the prosecutor offered to reprint her instruction with the accomplice language removed. (06/04/13 RP 109-10) The instruction given to the court by the prosecutor, and subsequently read to the jury, included the "on or about" language, without an objection from the defense. (CP 75)

The jury convicted Keelan as charged. (06/04/13 RP 141; CP 61) Keelan moved to set aside the verdicts. (06/04/13 RP 147; 08/02/13 RP 3-6; CP 80-87) This time the trial court agreed that the State had not presented sufficient evidence to prove the crime of malicious mischief against Keelan and Michael individually. (08/02/13 RP 13-16; CP 100-05) The trial court set aside the verdicts and dismissed the charges against both Keelan and Michael. (08/02/13 RP 16-17; CP 99, 213) The State now appeals the trial court's Order Arresting Judgment. (CP 222-24)

B. SUBSTANTIVE FACTS

Seth Walter owns a home on 130th Street East in Bonney Lake, Washington. (06/04/13 RP 24) The split-level home has three bedrooms and two bathrooms. (06/04/13 RP 25) In February, 2010,

Walter rented the home to Michael and Keelan Predmore and their two children. (06/04/13 RP25) Walter and the Predmores conducted a walk-through of the home at that time, and noted no significant damage to the home or its fixtures and appliances. (06/04/13 RP27-28)

In March, 2012, Keelan contacted Walter to report that the refrigerator was broken. (06/04/13 RP32) Walter went to the house to repair it. (06/04/13 RP 31) He went up the entry stairs and into the kitchen, and did not notice any unusual damage in those areas at that time. (06/04/13 RP 31-32)

Walter testified that the Predmores were not timely with their rent payments, and in April, 2012 they did not pay rent at all. (06/04/13 RP 29) Walter immediately notified his attorney, who began eviction proceedings. (06/04/13 RP 30) The judgment evicting the Predmores was entered and served on May 16, 2012. (06/04/13 RP30)

The Predmores vacated the house on May 24, 2012. (06/04/13 RP 32) Walter went to the residence that evening, and found that the house had been severely damaged. (06/04/13 RP 33) He saw holes in the walls, nail polish on the carpet, large dents in the refrigerator, holes in the kitchen cabinets, damage to the kitchen

island, the stairway banister pulled away from the wall, and holes in the bedroom and bathroom doors. (06/04/13 RP 33-36, 39, 40, 60-61, 64) Walls in the stairway, hallway, and bedrooms had multiple holes in them. (06/04/13 RP 38, 40, 44, 41, 42, 61) Some of the holes were small, others were the size of a fist or baseball. (06/04/13 RP 37, 64, 65)

Walter immediately notified the police and reported the damage to his insurance company. (06/04/13 RP 46) Walter testified about the cost of repairs as well:

> kitchen-approximately $5,000
> living room-$975
> hallway-less than $300
> master bedroom-$840
> master bathroom-$175
> second bedroom-$270
> stairway area-$720
> basement family room-$750
> downstairs bathroom-$530
> downstairs bedroom-$360
> **Total-approximately $13,700**

(06/04/13 RP 46-52)

Pierce County Sheriff Deputy Sheldon Lessard was dispatched to the residence on May 24, 2012, in response to Walter's call. (06/04/13 RP 59) He walked through the house and saw the damage. (06/04/13 RP 60-65) Lessard also testified that he was at the residence on the morning of May 17, 2012. (06/04/13 RP 66)

He met Michael Predmore, who was in the dining room taking apart a table. (06/04/13 RP 66-67) Lessard asked Michael why he was doing that, and Micheal responded that they were moving out because they had been evicted. (06/04/13 RP67)

Lessard noticed some of the same damage on May 17 as he saw on May 24, but he did not walk through the entire home so he did not know the extent of the damage during that first visit. (06/04/13 RP 68, 71, 72) Lessard testified that Michael did not seem evasive and did not behave as if he had anything to hide. (06/04/13 RP 72, 73)

Deputy Dennis Miller was with Lessard at the residence on May 17, 2012. (06/04/13 RP 76) He went up the stairs and down the hall to the master bedroom, and made contact with Keelan Predmore. (06/04/13 RP 76-77) He noticed holes in the walls, but does not recall if the damage was as extensive as reported by Lessard and Walter on May 24. (06/04/13 RP 78-79)

None of the State's witnesses observed Keelan or Michael cause any of the damage. (06/04/13 RP 55, 72, 79-80)

Michael called Roger McElroy, a home repair supply salesman, to testify on his behalf. (06/04/13 RP 90) McElroy testified that he came to the residence to give Michael an estimate

to replace damaged doors and kitchen cabinets. (06/04/13 RP 91) He saw the damage to the doors and the kitchen island and cabinets, but did not notice whether the residence had any other damage. (06/04/13 RP 92-93) McElroy provided a written quote on February 9, 2012. (06/04/13 RP 92)

III. ARGUMENT & AUTHORITIES

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)); State v. McCullum, 98 Wn.2d 484, 494, 656 P.2d 1064 (1983). The evidence presented in a criminal trial is legally sufficient to convict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Longshore, 141 Wn.2d 414, 420-21, 5 P.3d 1256 (2000).

Under CrR 7.4(a), a defendant may file a motion for arrest of judgment when there is insufficient proof of a material element of the crime charged. "A motion in arrest of judgment challenges the sufficiency of the evidence to take the case to the jury." State v.

Randecker, 79 Wn.2d 512, 515, 487 P.2d 1295 (1971). Review of a trial court decision on a motion for arrest of judgment requires the appellate court to engage in the same sufficiency inquiry as does the trial court. Longshore, 141 Wn.2d at 420. "A claim for insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The State charged Keelan with fist degree malicious mischief, pursuant to RCW 9A.48.070(1)(a).[3] (CP 1) The trial court rejected the State's accomplice liability argument, and the jury was instructed that to convict Keelan of the crime of malicious mischief it must find beyond a reasonable doubt that Keelan "caused physical damage to the property of another in an amount exceeding $5,000[.]"[4] (CP 75; 06/04/13 RP 109) Accordingly, the State had to prove that Keelan *personally and individually* caused over $5,000 in physical damage to Walter's property.

After considering Keelan's motion to arrest judgment, the trial

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[3] That statute reads, in relevant part:

> (1) A person is guilty of malicious mischief in the first degree if he or she knowingly and maliciously:
> (a) Causes physical damage to the property of another in an amount exceeding five thousand dollars[.]

[4] The State does not challenge on appeal the trial court's ruling rejecting accomplice liability.

court found that the State failed to meet this burden. In its oral ruling, the court specifically states:

> This was a case really, you know, that -- it was a case that clearly the State proved motive and opportunity. Defendants lived there. Defendants had given -- been given notice to evict, so they obviously had motive and opportunity to cause the damage. They also had other people there.
>
> But the State must prove each element, and the elements are that each defendant acted knowingly and maliciously in causing this damage, and that each defendant caused the physical damage to the property of another in an amount exceeding $5,000.
>
> Clearly, if this were a civil case and the proof was by a preponderance of the evidence, you are clearly there, but -- and I have -- I can't remember when I ever have arrested a judgment. If I have, it's been many, many years ago. And I tend to like the -- or let the jury weigh and balance the evidence and consider it.
>
> But in this case, taking a look at the specific elements, other than the fact that the defendants were married and they both lived there with other people and may have had a motive to cause this damage, there was really no other proof that they acted, each of them individually, acted and committed that damage.
>
> So applying the criminal law standard and arrest of judgment standard, there has been insufficient proof of material elements of the crimes, and so I am gonna grant the motions of each defendant to arrest judgment in this case.

(08/02/13 RP 15-17) Likewise, in its written findings, the court concludes: "The finding of the jury notwithstanding, the State was required to prove and did not prove as a material element, that Michael or Keelan Predmore individually acted to cause damage to

the property." (CP 104)

It is quite clear from the court's oral and written findings that the court looked at the State's evidence and found it lacking. The court's decision was not based on its own "impermissible weighing of evidence," or a finding that that State "failed to rule out an abstract possibility that another suspect committed the crime", or that the State failed to prove that "either defendant" caused the damage, as the State repeatedly claims in its brief. (Brief of Appellant at 11-14) Rather, the court correctly found that the State simply failed to present any evidence from which a rational juror could find that Keelan Predmore (or Michael Predmore) *individually* caused over $5,000 in damage to Walter's home.

The State repeatedly claims that it met its burden of proof because the evidence, and the reasonable inferences from the evidence, show that the defendants (plural) caused the damage. While it may be true that the evidence indicates at least one of the Predmores was responsible for the damage, the evidence does not establish that Keelan was that person, or that she was individually responsible for more than $5,000 of damage.

The State seems to be promoting a new theory of group culpability, whereby all members of a group can be held criminally

liable as long as the State can show that at least one member of the group was likely responsible for the crime. The State also seems to be arguing that it should be relieved of its burden of proving that a particular individual is liable either as a principal or an accomplice, whenever there is more than one actor who could have committed the crime and whenever the crime is committed in a "clandestine" fashion.

There is no legal support for the State's position. First, the law is quite well established that a person cannot be held accountable for the acts of another unless there is proof that the person acted as an accomplice. There must be proof that the defendant "solicits, commands, encourages, or requests another person to commit the crime, or he aids or agrees to aid another person in planning or committing the crime" with the knowledge that it will "promote or facilitate the commission of the crime." RCW 9A.08.020(3)(a)(i-ii). Physical presence and awareness of the criminal activity alone are insufficient to establish accomplice liability. In re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979); State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981).

A person also cannot be held criminally liable as an accomplice for a simple failure to act. State v. Jackson, 137 Wn. 2d

712, 723-24, 976 P.2d 1229 (1999). And a person has no duty to prevent a third party from causing physical harm to, or committing a criminal act against, another person or property. Youngblood v. Schireman, 53 Wn. App. 95, 99, 765 P.2d 1312 (1988) (citing Petersen v. State, 100 Wn.2d 421, 426, 671 P.2d 230 (1983); Blenheim v. Dawson & Hall, Ltd., 35 Wn. App. 435, 442, 667 P.2d 125 (1983)). Thus, the law clearly requires some specific act, which either constitutes a crime or provides support to another person's commission of a crime, in order for an individual to be held criminally responsible.

And finally, the State relies on a series of cases allowing conviction from circumstantial evidence where the crime is committed "clandestinely." (Brief of Appellant at 14-16) These cases are not helpful, however. First because the trial court here never found that the evidence did not establish that "either" defendant caused the damage. Rather, the trial court found that the evidence did not establish that "each" Predmore "individually acted to cause the damage." (08/02/13 RP 16; CP 104) And second, because in each of the cases cited by the State, the evidence and inferences from the circumstantial evidence pointed to just one possible suspect, and that one suspect was the only person on trial for the

crime.

Furthermore, the State does not attempt to argue that the evidence establishes, beyond a reasonable doubt, that Keelan personally caused over $5,000 in damage to the home. Instead, the State merely asserts that the jury can presume that Keelan took part in damaging the home because of the "scale of the destruction" and because nail polish was used to damage the carpet. (Appellant's Brief at 18)

Even if we accept the State's gender-stereotyped assumption that only a woman would or could use nail polish to damage a carpet, the State's argument still fails. That is because there is no evidence that the cost of replacing the carpets that were damaged by nail polish exceeded $5,000.

Even if the evidence showed that the damage to the home was likely caused "on or about the period between the 17th day of May and the 24th day of May, 2012", that does not cure the deficiency of proof that Keelan caused any of the damage, or even if she did, what that damage was and what it cost to repair.[5] There is simply

[5] Although this "on or about" language was only included in the jury instructions because the prosecutor neglected to remove it after she offered to reprint the "to convict" jury instructions (06/04/13 RP 109-10; CP 75), the defense did not object when the final instructions were submitted or read to the jury.

insufficient evidence to establish that Keelan individually caused damage in excess of $5,000, and the jury's verdict should not stand.

IV. CONCLUSION

The jury's verdict was not supported by sufficient proof that Keelan individually caused damage in excess of $5,000. The trial court made the correct decision when it arrested judgment and dismissed Keelan's conviction. The trial court's order arresting judgment should be affirmed.

DATED: March 7, 2014

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CERTIFICATE OF MAILING

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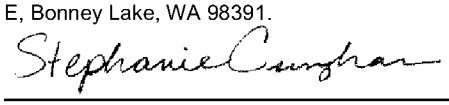

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